Public Prosecutor v Yap Fook Choy

HIGH COURT (KOTA KINABALU) — CRIMINAL TRIAL NO 47–04 OF 2001
SULONG MATJERAIE J
14 JUNE 2004

Criminal Law — Dangerous Drugs Act (Malaysia) — s 37(d) — Possession of drugs — Whether the accused had physical control and knowledge of the impugned drugs — Dangerous Drugs Act 1952 s 37(d)

Criminal Law — Dangerous Drugs Act (Malaysia) — s 37(da) — Trafficking — Weight of Methaphetamine was 152.43g — Whether amount of drugs supported charge of trafficking — Dangerous Drugs Act 1952 s 37(da)

Criminal Procedure — Trial — Prima facie case — Whether prosecution had made out a prima facie case

Evidence — Expert evidence — Chemist's analysis of substance — Chemist blended crystalline substances into a powder of uniform homogenous concentration for testing — Whether amount and weight of samples tested used to determine whether crystalline substances were Methamphetamine insufficient — Whether chemist's opinion could be relied on — Dangerous Drugs Act 1952 s 37(j)

Evidence — Witness — Failure to call witness — Accused stated that drugs could have belonged to 'Lau Yeh' — 'Lau Yeh' not called as witness — Whether 'Lau Yeh' a fictitious character

The accused was charged with trafficking in dangerous drugs under s39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). At about 2.30pm on 17 April 2001 the accused's vehicle was stopped by police. The accused was alone and upon inspection of the vehicle the police found a red plastic bag on the floor of the front left hand side of the passenger's seat containing a box with four clear plastic bags and another red paper envelope on the dashboard at the left front side of the vehicle, both containing a crystalline substance suspected to be Methamphetamine. These substances were later analysed by a Government Chemist and found to be a crystalline substance of the same nature and description. The chemist weighed the substance in each packet and blended the contents to a powder of uniform homogenous concentration and then tested random and representative samples of the homogenous powder using four types of tests. The powder from all the crystalline substances contained Methamphetamine and, after a quantitative test for concentration and purity, the chemist established that the net combined weight of Methamphetamine was 152.43g. The accused claimed to have no knowledge of the packets containing the drug and that they may have belonged to another person to whom he owed money called 'Lau Yeh' who had also been in his vehicle earlier that day. The issues raised at trial were: (1) whether a prima facie case had been made out by the prosecution; (2) whether the amount and weight of the samples tested used to determine whether the crystalline substances were Methamphetamine were insufficient and whether the opinion of the chemist should be relied upon; (3) whether the person

called 'Lau Yeh' existed; (4) whether the acussed was in possession of the drugs and (5) whether the amount of drugs supported a charge of trafficking.

Held, finding the accused guilty, convicting him of trafficking and imposing the death sentence:

(1) 'Prima facie' means on the face of it or at first glance and a 'prima facie case' is a case which is sufficient to call for an answer. 'Prima facie evidence' is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, but is not conclusive. There should be credible evidence on each and every essential ingredient of the offence. Credible evidence is evidence which has been filtered and which has gone through the process of evaluation. Any evidence which is not safe to be acted upon should be rejected; (*PP v Ong Cheng Heong* [1998] 6 MLJ 678, [1998] 4 CLJ 209) (see para 57).

(2) The prosecution had made out a prima facie case against the accused which if it remained unrebutted would warrant a conviction. This finding was based on an objective assessment of the evidence adduced in court (see para 58).

(3) Unless the opinion of a Government Chemist is so inherently incredible, the court is entitled to accept such opinion at face value as true and accurate unless the defence calls evidence in rebuttal by another expert to contradict that opinion; *K Saravanan a/l S Karuppiah v PP* [2002] 4 CLJ 144, [2002] 3 MLJ 465 and *Munusamy v PP* [1987] 1 MLJ 492 followed. The Government chemist had carried out a detailed analysis of the impugned substance and he had testified positively that his tests showed the substance to be Methamphetamine. The evidence given by the chemist was satisfactory and could not be faulted (see paras 51, 54 and 55)

(4) What is required for testing is that the actual amount or weight of samples taken for testing be given by the chemist in order to comply with s 37(j) of the DDA. Although the substance in four plastic bags was mixed and blended into a homogenous powder for testing the actual weight of the content of each plastic bag was identified, determined and given by the chemist; the amount tested by the chemist was sufficient to determine that the drug was Methamphetamine; and according to the chemist, blending the crystalline substance to a homogenous powder meant that if any part of the powder were to be taken for qualitative or quantitative analysis, it will produce a similar percentage of concentration or purity and even if the entire content was tested, the purity of the Methamphetamine found will be similar and the outcome will be the same; *Loo Kia Meng v PP* [2000] 3 MLJ 664, [2000] 3 CLJ 653 distinguished (see para 54).

(5) From the testimonies of the accused and DW3, although they both know 'Lau Yeh', his real name was not known. 'Lau Yeh' is a 'loan shark' yet there was no interest on the loan of RM100,000. More surprising, there was no loan agreement and neither was there any security offered

for the loan. Both witnesses also failed to provide the place where 'Lau Yeh' could be found. Even the simple thing like the registration plate number of 'Lau Yeh's' motorcycle could not be provided by them. 'Lau Yeh' was only a fictitious character (see para 85).

(6) The accused was seen to be driving slowly in a busy street at Inanam and when he was stopped he was in a state of shock. He asked PW2: 'Boss, kita pergi ke hadapan, kita boleh cerita' and when the impugned drug was found the accused uttered the words 'Ada sikit barang'. The irresistible inference was that the accused must have had knowledge of the impugned drugs inside the red plastic bag as well as the red paper envelope at the dashboard on the left front side of the vehicle and therefore that the accused had physical control of the impugned drug (see paras 94 and 95).

(7) Due to the weight of the drug involved, the accused was presumed under s 37(da)(xvi) of the DDA, until the contrary is proved, to be trafficking in the said drug. After careful examination and evaluation of the evidence in its entirety, and perusal of all the authorities filed into this court, there was overwhelming evidence to show that the prosecution had proved its case beyond any reasonable doubt and that the defence failed to raise any reasonable doubt on the prosecution case (see paras 97 and 99).

[Bahasa Malaysia summary

Tertuduh telah dituduh mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Pada 2.30pm pada 17 April 2001 kenderaan tertuduh telah dihentikan oleh polis. Tertuduh berseorangan dan setelah polis memeriksa kenderaan itu polis telah menjumpai satu beg plastik merah di atas lantai di sebelah kiri bahagian hadapan tempat duduk penumpang yang mengandungi satu kotak dengan empat beg plastik jernih dan satu sampul surat merah di atas papan pemuka pada sebelah kiri bahagian hadapan kenderaan itu, kedua-duanya mengandungi bahan berhablur yang disyaki Methamphetamine. Bahan ini kemudiannya dianalisakan oleh seorang Ahli Kimia Kerajaan dan didapati adalah bahan berhablur yang mempunyai sifat dan gambaran yang sama. Ahli kimia itu telah menimbang bahan di dalam setiap paket dan menyebatikan kandungan itu kepada bedak yang mempunyai kepekatan seragam yang sama dan telah menguji sampel-sampel rawak dan representatif bedak yang seragam itu menggunakan empat jenis ujian. Semua bedak daripada bahan-bahan berhablur mengandungi Methamphetamine, dan selepas ujian kuantitatif untuk kepekatan dan ketulenan, ahli kimia itu mendapati bahawa jumlah berat bersih Methamphetamine adalah 152.43g. Tertuduh tidak mengaku mempunyai pengetahuan tentang paket-paket itu yang mengandungi dadah dan berkata bahawa ia mungkin dipunyai oleh seorang kepada siapa beliau terhutang wang dipanggil 'Lau Yeh' yang berada di dalam kenderaan beliau pada hari itu. Isu-isu yang dibangkitkan di perbicaraan itu adalah: (1) sama ada kes prima facie telah dibuktikan oleh pihak pendakwaan; (2) sama ada jumlah dan berat sampel-

A sampel yang diuji yang digunakan untuk menunjukkan sama ada bahan berhablur itu adalah Methamphetamine tidak mencukupi dan sama ada pendapat ahli kimia itu patut diikut; (3) sama ada orang yang bernama 'Lau Yeh' wujud; (4) sama ada tertuduh mempunyai milikan dadah itu dan (5) sama ada jumlah dadah itu menyokong pertuduhan pengedaran.

B **Diputuskan**, mendapati tertuduh bersalah, menyabit beliau mengedar dadah dan mengenakan hukuman mati:

(1) 'Prima facie' bermakna pada permukaannya atau pada pertama kali pandang dan 'prima facie case' adalah kes yang mana memadai untuk meminta jawapan. 'Prima facie evidence' adalah keterangan yang C mencukupi untui membuktikan fakta dalam ketiadaan keterangan bercanggah, tetapi tidak muktamad. Sepatutnya terdapat keterangan yang boleh dipercayai pada setiap bahagian kesalahan itu. Keterangan yang boleh dpercayai adalah keterangan yang telah diuji dan telah dinilaikan. Sebarang keterangan yang tidak selamat digunakan patut D ditolak; (*PP v Ong Cheng Heong* [1998] 6 MLJ 678, [1998] 4 CLJ 209) (lihat perenggan 57).

(2) Pihak pendakwaan telah membuktikan kes prima facie terhadap tertuduh yang jika ia tidak dipatahkan akan mewajibkan sabitan. Keputusan ini berdasarkan penaksiran keterangan yang dikemukakan di mahkamah E yang objektif (lihat perenggan 58).

(3) Kecuali jika pendapat seorang Ahli Kimia Kerajaan sukar dipercayai, mahkamah ini berhak menerima pendapat sebegitu berdasarkan nilailahirnya sebagai benar dan tepat kecuali jika pihak pembelaan mengemukakan keterangan mematah oleh pakar yang lain untuk menyangkal pendapat itu; K Saravanan a/l S Karuppiah v PP [2002] F CLJ 144, [2002] 3 MLJ 465 dan Munusamy v PP [1987] 1 MLJ 492 diikut. Ahli kimia kerajaan telah menjalankan analisa yang terperinci bahan yang dipersoalkan dan beliau telah memberi keterangan secara positif bahawa ujian beliau menunjukkan bahan itu sebagai Methamphetamine. Keterangan yang diberikan oleh ahli kimia adalah memuaskan dan tidak dapat disalahkan (lihat perenggan 51, 54 dan 55).

G (4) Apa yang diperlukan untuk menguji adalah bahawa jumlah atau berat sampel-sampel yang diambil untuk ujian sebenarnya diberikan oleh ahli kimia untuk mematuhi s 37(j) ADB. Walaupun bahan di dalam empat beg plastik telah dicampur dan disebatikan menjadi bedak seragam untuk diuji berat sebenar kandungan setiap beg plastik dikenal pasti, H ditentukan dan diberi oleh ahli kimia; jumlah yang diuji oleh ahli kimia adalah cukup untuk menentukan bahawa dadah itu adalah Methamphetamine; dan mengikut ahli kimia itu, menyebatikan bahan berhablur kepada bedak seragam bermakna bahawa jika sebarang bahagian daripada bedak itu diambil untuk analisa kualitatif atau kuantitatif, ia akan menghasilkan peratus kepekatan atau ketulenan yang I sama dan jika seluruh kandungan itu diuji, ketulenan Methamphetamine yang didapati akan sama dan keputusannya adalah sama; *Loo Kia Meng v PP* [2000] 3 MLJ 664, [2000] 3 CLJ 653 dibezakan (lihat perenggan 54).

(5) Daripada keterangan tertuduh dan DW3, walaupun mereka berdua mengenali 'Lau Yeh', nama sebenar beliau tidak diketahui. 'Lau Yeh' adalah seorang 'loan shark' tetapi tidak terdapat faedah pada pinjaman RM100,000. Apa yang lebih memeranjatkan adalah tidak terdapat perjanjian pinjaman ataupun cagaran untuk pinjaman itu. Kedua-dua saksi juga gagal memberitahu tempat di mana 'Lau Yeh' boleh dijumpai. Perkara yang semudah nombor plet pendaftaran motorsikal 'Lau Yeh' juga tidak dapat dibekalkan oleh mereka. 'Lau Yeh' hanyalah satu rekaan (lihat perenggan 85).

(6) Tertuduh telah dilihat memandu di jalan yang sibuk di Inanam dan dan apabila beliau dihentikan, beliau di dalam keadaan terperanjat. Beliau bertanya kepada PW2 'Boss, kita pergi ke hadapan, kita boleh cerita' dan apabila dadah yang dipersoalkan dijumpai, tertuduh berkata 'Ada sikit barang'. Inferens yang tidak dapat dibendung adalah bahawa tertuduh mesti mempunyai pengetahuan mengenai dadah yang dipersoalkan di dalam beg plastik berwarna merah dan sampul surat merah di atas papan pemuka di sebelah kiri bahagian hadapan kenderaan itu dan oleh itu tertuduh mempunyai kawalan fizikal dadah yang dipersoalkan itu (lihat perenggan 94 dan 95).

(7) Oleh kerana berat dadah yang terlibat, tertuduh dianggap di bawah s 37(da)(xvi) ADB, sehingga dibuktikan sebaliknya, mengedar dadah itu. Setelah penelitian dan penilaian keterangan secara menyeluruh, dan penelitian semua autoriti yang difailkan di dalam mahkamah ini, terdapat keterangan yang amat sangat untuk menunjukkan bahawa pihak pendakwaan telah membuktikan kesnya melebihi keraguan yang munasabah dan pihak pembelaan gagal membangkitkan keraguan munasabah pada kes pihak pendakwaan (lihat perenggan 97 dan 99).]

Notes

For cases on s 37(d) of the Dangerous Drugs Act (Malaysia), see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 163–168.

For cases on s 37(da) of the Dangerous Drugs Act (Malaysia), see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 192–201.

For cases on prima facie case, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4160–4175.

For cases chemist's analysis of substance, see 7(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1366–1368.

For cases on failure to call witness, see 7(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2589–2592.

For meaning of and presumption of possession of dangerous drugs, see 11 *Halsbury's Laws of Malaysia*, para [190.549].

For trafficking in dangerous drugs, see 11 *Halsbury's Laws of Malaysia*, para [190.582].

For opinion of experts, see 12 *Halsbury's Laws of Malaysia*, paras [210.117]–[210.128].

For failure to call witnesses, see 12 *Halsbury's Laws of Malaysia*, paras [210.035].

Cases referred to

Chan Pean Leon v PP [1956] MLJ 237 (folld)
K Saravanan a/l S Karuppiah v PP [2002] 4 CLJ 144, [2002] 3 MLJ 465 (folld)
Kesavan a/l Petchayo @ Balakrishnan v PP [2003] 2 MLJ 209, [2003] 1 CLJ 846 (refd)
Leow Nghee Lim v Reg [1956] MLJ 28 (refd)
Loo Kia Meng v PP [2000] 3 MLJ 664, [2000] 3 CLJ 653 (distd)
Muhammad b. Hassan v PP [1998] 2 CLJ 170 (refd)
Munusamy v PP [1987] 1 MLJ 492 (folld)
PP v Ong Cheng Heong [1998] 6 MLJ 678, [1998] 4 CLJ 209 (refd)
PP v Tang Kheng Teong & Anor [1997] 3 MLJ 637 (refd)
Tong Peng Hong v PP [1955] MLJ 232 (refd)
Wong Nam Loi v PP [1997] 3 MLJ 795 (refd)

Legislation referred to

Criminal Procedure Code s 180(3), 277
Dangerous Drugs Act 1952 ss 37(d), 37(da), 37(da)(xvi), 37(j), 37A(1)(b), 39B(2), First Schedule

Norliza Yusoff (Attorney-General's Chambers) for the prosecution.
Cedric Choo (Cedric Choo & Co) for the defendant.

Sulong Matjeraie J

[1] The accused, Mr Yap Fook Choy, was charged upon the following charge:

> That you, on 17 April 2001 at around 2.30pm, in front of Choon Nyen Fatt Supermarket, Pekan Inanam, in the District of Kota Kinabalu, in the State of Sabah, on your own behalf, did traffic in a dangerous drug, to wit 152.43 grammes of Methamphetamine, and you have thereby committed an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980) and punishable under s 39B(2) of the same Act.

CASE OF THE PROSECUTION

[2] According to the evidence led by the prosecution, on 17 April 2001 at around 2.30pm, ASP Fisol bin Salleh ('PW2') led a police party comprising Chief Inspector Ederian Masaat, Chief Inspector Afandi Bakar, Detective Sergeant Major Japri Bakul @ Henry, Lance Corporal Sabturani bin Maul and Constable Ibrahim Mahadi, all of the Narcotics Branch, Police Headquarters, Kepayan, Kota Kinabalu and conducted an anti-narcotics operation at Pekan Inanam, Mengattal, Kota Kinabalu.

[3] At about 2.30pm with the assistance of his men, PW2, ASP Fisol stopped one vehicle Suzuki Vitara, purplish in colour, bearing plate registration number SA 8202 L (vehicle) driven slowly by a male Chinese driver, later identified as Yap Fook Choy, the accused, in front of Choon Nyen Fatt supermarket, Inanam. The accused was alone inside the vehicle. PW2 then approached the vehicle and opened its driver's door. When PW2 introduced

himself as a Police Officer by showing his warrant card, the accused was in a state of shock and said: 'Boss kita pergi ke hadapan, kita boleh cerita'. This request was ignored by PW2.

[4] PW2 ordered the accused to get out of his vehicle and with the help of Detective Corporal Sabturani, Constable Ibrahim bin Mahadi, and assisted by Detective Sergeant Major Japri Bakul, PW2 personally made an inspection inside the vehicle.

[5] In the presence of the accused, PW2 found a red plastic bag on the floor of the front left hand side of the passenger's seat. PW2 asked the accused as to what was inside the red plastic bag, and the accused said: 'ada sikit barang'. PW2 immediately administered to the accused the statutory caution under s 37A(1)(b) of the Dangerous Drugs Act 1952 ('DDA').

[6] PW2 then took possession of the red plastic bag and when he opened the said plastic bag in front of the accused, he found inside it one blue/white box with the writing of 'Tape Dispenser'. PW2 opened the said box and found four (4) clear plastic bags containing a crystalline substance which PW2 suspected to be Methamphetamine. PW2 ordered his men to handcuff the accused.

[7] A further search was conducted on the other parts inside the vehicle and PW2 found one red paper envelope with the writing 'Good Ties Good Times at Parkson' on the dashboard at the left front side of the vehicle. Inside the red paper envelope PW2 found one clear plastic bag containing a crystalline substance suspected to be Methamphetamine. A body search was made on the accused's person by PW2 but he found nothing incriminating except for a few personal items of the accused such as a chocolate coloured wallet ('P25') containing RM600 cash ('P27'), driving licence ('P26'), ATM Mayban Finance Card ('P28') and two hand phones (mobiles) of Nokia ('P23') and Siemens ('P24') brand. Having searched the vehicle PW2 took possession of all the exhibits seized both from the accused's person and the vehicle and he personally drove the vehicle away. The exhibits were at all times in the personal possession of PW2.

[8] When PW2 drove the vehicle, the accused was sitting at the back passenger seat escorted by Detective Corporal Sabturani, Constable Ibrahim Mahadi. They went to the residence of the accused but found nothing incriminating. While there, all the exhibits were in the possession of PW2. Later, the accused was taken to the Narcotics Department of the District Police Headquarters, Karamunsing, Kota Kinabalu where, in his (the accused's) presence PW2 made markings on all the exhibits seized. PW2 drew up the search list and weighed the seized suspected drug. While driving the vehicle, PW2 kept all the exhibits on his lap.

[9] PW2 made a Police Report on the arrest and the seizure of exhibits made under Menggatal Police Report No. 1540/2001. Thereafter all the seized exhibits together with the accused were handed over to the Investigating Officer, PW5 Chief Inspector Zulfakar bin Abdul Aziz ('IO').

[10] The vehicle driven by the accused ie the Suzuki Vitara SA 8202 L was bought by the accused for the use of PW4 Liew Chwee Ing, his wife. The accused had been the registered owner of the said vehicle since 1996.

[11] The above facts as made out by the Prosecution are not disputed by the defence as reflected in their submission of no case to answer at encl 30 duly filed and read in this court.

THE EVIDENCE OF THE CHEMIST

[12] PW1 En Shaari bin Desa, the Chemist, gave evidence that he has worked as a chemist since 1992. He has an Honours Degree in Science (Chemistry) from the Universiti Kebangsaan Malaysia, Bangi where he graduated in 1991. He is a member of the Institute of Chemists and had followed in service training and had also exposed himself to the workings of senior chemists during the tenure of his service. Since 1997 he has analysed dangerous drugs which includes among others cannabis, methamphetamine, heroin, monoacetylmorphines, 3, 4 Methylenedioxyamphetamine, Ketamine, codine. He had given evidence in both the High Court as well as the lower courts.

[13] PW1 took great care in analyzing the exhibits handed over to him by PW5 Chief Inspector Zulfakar bin Abd Aziz.

[14] The exhibits were kept in a locked steel cabinet in the strong room at the Narcotics division of the Chemistry department Malaysia, Kota Kinabalu. Only PW1 has the key to the steel cabinet whereas the keys to the strong room were kept by the Director of Chemistry Department, Sabah.

[15] The exhibits were: (1) the red plastic bag which contains the four clear plastic bags containing a crystalline substance and (2) a red paper envelope which contains one clear plastic bag containing a crystalline substance.

[16] The markings on the four clear plastic bags found in the red plastic bag were a signature on each one of them; the date of 17 April 2001 and they were numbered A1, A2, A3 and A4, and to each of them the Chemist marked (KK)FOR 691/01-0 followed by capital letter 'S' and were respectively marked S1, S2, S3 and S4.

[17] In the meantime the red paper envelope had a marking of the letter 'B', a signature and was dated 17 April 2001. Inside it the clear plastic bag was marked 'B1' which contained a crystalline substance.

[18] The chemist found that the contents of the five packets were a crystalline substance of the same nature and description. He weighed them using an electronic scale 'Sartorius' model BP221S, code 'MB 15'. Before weighing was done, the accuracy and competency of the scale was verified using two standard weights; one with a weight of 1.000gm and the other 100.000gm in weight. Thereafter the electronic scale was confirmed to be in good working condition.

[19] The weight of the clear crystalline substance in respect of the four plastic bags exhs P10A, P10B, P10C and P10D were 49.3972g, 49.3320g, 49.3888g and 49.2661g respectively, and thus having a combined weight of 197.3841g.

[20] The weight of the clear crystalline substance found in the plastic B1 (exh P13) was 5.0466g.

[21] PW1 re-emphasised that the crystalline substances found were of the same nature and description. After weighing had been done, PW1 mixed and blended the contents from plastic bags P10A, P10B, P10C and P10D using a 'Sumeet' commercial blender in order to achieve a powder of uniform homogenous concentration. The blending process took five (5) minutes. When cross examined as to the purpose of blending the crystalline substance from P10A, P10B, P10C and P10D for five minutes, PW1 replied:

> 'Tujuan ketulan hablur putih dikisar ialah untuk menjadi ianya homogen bermaksud, mana-mana bahagian pada serbuk tersebut sekiranya diambil untuk analisis qualitatif dan quantitatif akan memberikan peratus ataupun nilai kepekatan yang seragam.'

This court's translation:

> 'The purpose of blending the white crystallized substance is to make it homogenous, which means, should any part of the powder be taken for qualitative and quantitative analysis, it will produce a similar percentage of concentration.'

TESTS UNDERTAKEN

[22] Three colour tests were undertaken. The first: Marquis Reagent test where PW1 took random and representative samples of the homogenous powder. The outcome of the Marquis Reagent test was that PW1 found the presence of 'Primary Amine' group in the said homogenized powder.

[23] The second colour test, the 'Simon's' test found the presence of 'Secondary Amine' in the said homogenized powder. A third test was done by using 'Silver Nitrate' and this resulted in the finding indicating the presence of a salt base known as 'Hydrochloride'.

[24] After the three colour tests were done, PW1 concluded that the crystalline substance blended to become homogenized powder containing 'Methamphetamine Hydrochloride'. Further, a fourth test was conducted by PW1 using Gas Chromatography-Mass Spectrometry (GC-MS) by taking random representative samples from the homogenized powder. The machine used was 'Shimadzu' and the column used was HP-5.4.

[25] From the analysis undertaken using the said machine, it was confirmed that the blended homogenized powder contained 'Methamphetamine', that is the type of dangerous drug as listed in the First Schedule of the Dangerous Drug Act 1952.

[26] After the existence of Methamphetamine has been established, a quantitative test was undertaken by PW1 to ascertain its percentage of concentration or purity. For this test, PW1 employed a machine 'Gas Chromatography Flame Ionic Detector' — 'Shimadzu' column HP-5 and used 24 replicates from random and representative samples. PW1 explained that 24 replicate samples were used as this is the standard practice. PW1 said that based on statistics for chemistry analysis, the minimum samples for quantitative analysis was 21. He has in fact exceeded the minimum requirement by using 24 replicates. The outcome of this quantitative test showed that the percentage of concentration or purity of Methamphetamine in the crystalline substance was 75.31% after allowing a margin of error of O.94%. PW1 therefore concluded that the net weight of Methamphetamine from the homogenous powder from A1l, A2, A3 and A4 (exhs P10A, P10B, P10C and P10D) was 148.64g.

[27] Here this court notes that this weight of 148.64g exceeds the 50g stipulated under s37(da)(xvi) of the DDA.

[28] The total weight used for quantitative analysis was 0.3386g. For colour tests and the test using GCMS an amount of 7.12g was used.

[29] PW1 conducted the same test on the crystalline substance found in the clear plastic bag found in the red paper envelope 'B1' ('P13') adopting the same methods as hereinbefore mentioned except that he used 'Mortar' to turn the said crystalline substance into powdery form. PW1 used 0.72g for colour and GCMS tests and 0.1133g was used in the quantitative test coming from six representative and random samples. From the various tests done on the contents of exh P13, PW1 concluded that the amount of Methamphetamine found there from was 75.24% after allowing a margin of error of 0.94%. The net weight of Methamphetamine found was 3.79g.

[30] Hence the total combined weight of Methamphetamine found was 152.43g, the amount mentioned in the charge against the accused.

[31] It is of interest to note that PW1 gave evidence that the time taken to undertake quantitative analysis of the 24 replicate samples was 16 working hours. This is not taking into account that the reagent and the machines Gas Chromatography Flame Ionic Detector may not be ready and in good order for it requires maintenance once the replicate samples exceeds 100.

[32] When cross examined, PW1 disagreed with the learned counsel for the accused that the amount and weight of samples used to determine that the crystalline substance contained methamphetamine was insufficient. PW1 stood firmly on his position that the amount and weight of the representative samples taken at random was clearly sufficient for the purpose of determining whether the drug methamphetamine was found in the homogenized powder. Further it was confirmed by PW1 that the degree of concentration or purity of methamphetamine will not change even if more samples are used. PW1 even went to the extent to state that even if the entire contents of the homogenized powder from the crystalline substance were to be analysed, the degree of concentration or purity of methamphetamine will remain the same.

ANALYSIS AND TESTING GUIDELINES FOR METHAMPHETAMINE.

[33] PW1 informed this court that the method of testing methamphetamine adopted by him is based on the United Nations Manual entitled: '*Recommended Method for Testing Amphetamine and Methamphetamine*'. This manual, according to PW1 is accepted and used by all chemists who are working and dealing with Narcotics at the Chemistry Department, throughout Malaysia to test the drug Methamphetamine.

[34] It could therefore be observed that what PW1 had done with the crystalline substance found was firstly he weighed it and mixed the contents of exhs P10A, P10B, P10C and P10D together with the help of a Sumeet commercial blender in order to homogenize the powder so that every part would be the same as the others. He applied the three colour tests on random and representative samples of the powder by using three reagents known as Marquis, Simon's and silver nitrate and found that the homogenized substance contained Methamphetamine Hydrochloride. The fourth test carried out involved the use of Gas Chromatography Mass Spectrometry. The outcome of the analysis using Gas Chromatography Mass Spectrometry confirmed that the homogeneous powder contained Methamphetamine, a type of dangerous drug listed in the First Sch of the DDA.

[35] After the existence of the drug Methamphetamine had been confirmed, a final quantitative test was conducted and this employed the usage of a Gas Chromatography Flame Ionic Detector on 24 replicates random and representative samples. From this test PW1 concluded that the degree of concentration or purity of Methamphetamine was 75.31% after allowing a margin of error of 0.94%. He concluded further that the crystalline substance found in the four clear plastic bags P10A, P10B, P10C and P10D contained a net weight of 148.64g of Methamphetamine.

[36] A similar test was done in respect of the contents of the clear plastic bag found in the red paper envelope B1 exh P13 with a conclusion that the net weight of Methamphetamine found therein was 3.79g. Hence the total amount of Methamphetamine under the charge was 152.43g.

[37] It is pertinent to re-emphasise here that the chemist, PW1 pointed out that the purpose of blending the white crystallized substance was to make it homogenous, which means, if any part of the powder were to be taken for qualitative or quantitative analysis; it will produce a similar percentage of concentration of Methamphetamine. This is what happened in this instant case. It means therefore that even if less than 24 replicate representative and random samples were employed for analysis, the result would be the same. The converse will also be true in that PW1 gave evidence that even if the entire samples were analysed, the percentage of concentration or purity of Methamphetamine will still be similar.

EVIDENCE OF OTHER PROSECUTION WITNESSES

[38] PW3, Mr Oh Sen Toh works as a Foreman at Hiap Loong Tyre Shop, Penampang Towering Centre, Kota Kinabalu. He testified that on 17 April

2001 the accused came to his work place to do wheel alignment in respect of his car – Isuzu Invader and not the Suzuki Vitara. After the job was completed he said the accused paid the money and left the premises. PW3 did not see if the accused returned to PW3's work place after doing his wheel alignment and he did not see if the accused brought another car there. He did not see if the accused had taken any other vehicle to his tyre shop.

[39] The next prosecution witness was the wife of the accused, PW4, Mdm Liew Chwee Ing, a house wife who has to look after three (3) children. Sometimes she does a bit of selling through 'direct selling'. She uses the vehicle: Vitara registration number SA 8202 L. The accused bought the vehicle.

[40] On 17 April 2001 PW4 used the vehicle at 5.45am to send her child to school and came back at 6.30am during which time the accused was still asleep in their house. When she sent her child to school, the child was seated on the passenger's seat in front. She did not notice any red plastic bag on the floor of the passenger's seat. Her child did not complain that there was any red plastic bag there as well. The vehicle was parked outside the house in front of the gate which was always open. She went out for breakfast with the accused at about 9am in the vehicle Vitara. The accused drove and PW4 sat on the passenger's seat on the left but she did not see any red plastic bag on the floor. They went home at about 12 mid-day and immediately thereafter the accused left the house and used the Vitara. PW4 confirmed that on 17 April 2001 she did not see any red plastic bag on the floor of the Vitara. PW4 also testified that after that she did not use the vehicle Vitara.

[41] The last witness for the prosecution was PW5 Chief Inspector Zulfakar bin Abdul Aziz, the Investigating Officer. He testified that on 17 April 2001 PW2 ASP Fisol came to his office handing over to him the accused and the relevant exhibits: one red plastic bag marked AA dated 17 April 2001 containing a white/blue box with the writing 'Tape Dispenser' marked 'A'. Inside the said box there were four (4) plastic bags each marked A1, A2, A3 and A4. PW5 was also handed one red paper envelope marked 'B' containing one plastic bag marked B1. PW5 was also handed one vehicle Suzuki Vitara registration number SA 8202 L together with the keys. Further PW2 also handed over to him the Police Report ('P20'), Form CID 47 ('P21'), lists ('P22') and all the personal items of the accused, exhs P23, P24, P25, P26, P27, P28. All these items were kept by PW5 under locked cabinet while the accused was sent to the lock up. Only PW5 had the key to the locked cabinet. Photographs of the relevant exhibits were taken before PW5 sent them to the Chemistry Department together with form POL 31 on 19 April 2001.

COURT'S FINDING AFTER THE CONCLUSION OF THE CASE FOR THE PROSECUTION

[42] Both the learned deputy public prosecutor and learned counsel for the accused submitted at the end of the case for the prosecution. Having considered their submissions and after perusing the authorities offered, this court finds that a prima facie case has been made out against the accused on the offence charged and under the provision of s 180(3) of the Criminal

Procedure Code, the accused was called upon to enter his defence. Three alternatives were notified to the accused that he could take in his defence:

(i) to testify on oath and subject himself to cross examination;

(ii) to make an unsworn statement from the dock which will not render him liable to be cross examined;

(iii) to remain silent.

[43] The accused chose to give evidence on oath.

[44] This court will now give the reason why it made a finding that the prosecution has made out a prima facie case against the accused and called upon him to enter his defence.

[45] It is obvious that the prosecution's case was straight forward and was not contradicted. The evidence of PW2 ASP Fisol bin Salleh on what transpired has been accepted by the accused through his learned counsel and this is reflected in his submission at encl 30 which was filed and read in open court. This court therefore accepts as true and accurate, the narration of PW2 on what had happened on 17 April 2001 at 2.30pm.

[46] The vehicle Suzuki Vitara SA 8202 L is owned by and registered under the name of the accused. When the police stopped the said vehicle it was the accused who drove the vehicle. According to PW2, the accused was in a state of shock when his driver's door was opened by PW2 who identified himself as a Police Officer by showing his warrant card. The accused then said 'Boss kita pergi ke hadapan, kita boleh cerita'. When the accused was asked by PW2 as to what was inside the red plastic bag found on the floor of the front left hand side of the passenger's seat, he replied: 'ada sikit barang'. Why did the accused say 'boss, kita pergi ke hadapan, kita boleh cerita'? Learned defence counsel said that 'such words uttered in the Malay language can also suggest that the accused intends to bribe the police officer, or that the accused intends to move his car to a better spot to prevent obstruction'. He also submitted that as there could be many inferences both favourable and unfavourable the one favouring the accused must be adopted.

[47] It must be appreciated that the police should know better to avoid unnecessary obstruction. That is the duty of the police and for the accused to suggest that the words 'boss, kita pergi ke hadapan, kita boleh cerita' were uttered to prevent obstruction is quite unacceptable to this court. The other alternative inference suggested by learned counsel for the accused that he intends to bribe the police officer may be the unfavourable inference that he is postulating to. Clearly those words impute something more than meets the eyes.

[48] The usage of the words 'ada sikit barang' by the accused clearly indicate his knowledge of the impugned red plastic bag found at the floor of the vehicle. He was alone, he drives the vehicle and he owns the vehicle. The other person, PW4 Mdm Liew Chwee Ing who has access to the vehicle has got to be excluded from being in the know about the impugned red plastic

bag as she testified that when they went home around 12 noon, the accused drove the vehicle. She was seated at the left hand side of the vehicle on the passenger's seat. She did not see any red plastic bag on the floor. Soon after that PW4 testified that the accused left the house using the said vehicle. He was stopped by the police at 2.30pm the same day where the police found the impugned red plastic bag containing a white/blue box which in turn contained four clear plastic bags containing a crystalline substance suspected to be Methamphetamine. The police also recovered from the vehicle one red paper envelope inside which was a plastic bag containing a crystalline substance suspected to be Methamphetamine as well.

[49] Suffice it to say here that the suspicion that the said crystalline substance was in fact Methamphetamine was confirmed by PW1 following the various tests he carried out. These tests are done in accordance with the United Nations Manual entitled '*Recommended Method for Testing Amphetamine & Methamphetamine*' which is being followed by all the chemists working in the Chemistry Department throughout Malaysia.

[50] The opinion of PW1 is confined to the elementary nature and identity of the substance. PW1 is essentially an independent expert witness assisting the court to determine the identity of the impugned substance. It is the considered view of this court that Government Chemists who work in the Government's Chemistry Department are public servants who are obliged to follow certain investigatory methods and procedures for the analysis of drugs as defined by their Department. The procedure followed by PW1 in analyzing the alleged drug is in consonance with the procedure recommended by the United Nations which has been adopted for use by all the chemists working in the Department of Chemistry throughout Malaysia. Further the opinion given by the chemist PW1 is basic as it only involved the identification of the impugned drug.

[51] The crystalline substance found had become a homogenized powder and PW1 said in no uncertain terms that even if the entire impugned drug was analysed the outcome will be the same as the outcome from the 24 replicate samples that he analysed. Further unless the opinion of PW1 is inherently so incredible, this court is entitled to accept such opinion at face value as true and accurate unless the defence calls evidence in rebuttal by another expert to contradict PW1's opinion per Mohd Noor Ahmad JCA (as he then was) in *K Saravanan a/l S Karuppiah v Public Prosecutor* [2002] 4 CLJ 144 at p 152 (also [2002] 3 MLJ 465), *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, Supreme Court's decision.

[52] The decision of this court to accept the evidence of PW1 is fortified by the fact that in *Public Prosecutor v Tang Kheng Teong & Anor* [1997] 3 MLJ 637 Abdul Malek Ahmad JCA (as he then was) said: 'It was incorrect for the judge to reject the chemist's evidence for not having complied with the provisions of the Act in conducting the chemical analysis on the drugs recovered. In regard to the evidence of the chemists, unless the evidence is so inherently incredible that no reasonable person can believe it to be true, it should be accepted as prima facie evidence'.

[53] The same sentiments have also been expressed in the Court of Appeal decision in *Kesavan a/l Petchayo @ Balakrishnan v Public Prosecutor* [2003] 2 MLJ 209, [2003] 1 CLJ 846 where Gopal Sri Ram JCA at p 214 said 'The evidence sufficiently establishes beyond a reasonable doubt that for the purpose of analysis, a sufficient sample was taken of the substance in question in order to establish that it was indeed heroin and monoacetylmorphine, respectively'.

[54] Learned counsel for the accused offered *Loo Kia Meng v Public Prosecutor* [2000] 3 MLJ 664, [2000] 3 CLJ 653 as the authority to say that the chemist has failed to analyse samples of at least 10% of the substance contained in the receptacles before concluding that it was drugs. With great respect this court is of the considered view that *Loo Kia Meng* is distinguishable from this instant case. In *Loo Kia Meng* the appellant was convicted on 15 August 1995 for an offence of trafficking in 4,105g of cannabis. In our instant case the drug found is Methamphetamine. Secondly the Court of Appeal held in *Loo Kia Meng* that what the learned judge held was that he found that the appellant was in custody and control of the two packages therefore the presumption under s 37(d) of the DDA applies and he was deemed to be in possession of the cannabis. Having made that finding he then invoked the presumption under s 37(da) of the DDA. In other words he used the presumption of possession under s 37(d) of the DDA to invoke the presumption of trafficking under s 37(da) of the DDA. Therefore Shaik Daud Ismail JCA held that the learned judge fell into the same error as the learned judge in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273, [1998] 2 CLJ 170. This is not so in this instant case. Further in *Loo Kia Meng* the Court of Appeal held that pursuant to s 37(j) of the DDA, the chemist is required to give the actual amount or the actual weight of the samples taken in order to comply with that section. In our instant case what needs to be appreciated is that the crystalline substance found in the four transparent plastic bags was mixed and blended turning the contents into a homogenous powder. The actual weight of the content of each of the plastic bags had been identified and determined and given by the chemist to this court. Lastly what was more significant is that the chemist took representative samples at random and has testified positively that the result of his tests showed that the crystalline substance was Methamphetamine. The chemist went on to say that since the crystalline substance had been homogenized the amount tested is sufficient to determine that the drug was Methamphetamine. It was also the considered view of the chemist that the purpose of blending the white crystallized substance is to make it homogenous, which means, if any part of the powder were to be taken for qualitative or quantitative analysis, it will produce a similar percentage of concentration or purity. The chemist added even if the entire content was tested, the purity of the Methamphetamine found will be similar and the outcome will be the same. It is clear that the chemist in this instant case has carried out a detailed analysis of the impugned substance and he testified positively that the result of his tests showed clearly that the impugned substance is Methamphetamine, a drug listed in the First Sch of the DDA.

[55] This court is therefore satisfied that the evidence given by the chemist was satisfactory and cannot be faulted.

[56] The question before this court is whether on the evidence adduced thus far by the prosecution, it had proven its case against the accused on a prima facie basis.

[57] There exists a plethora of authorities on the meaning of a prima facie case. Quoting Vincent Ng J in *Public Prosecutor v Ong Cheng Heong* [1998] 6 MLJ 678, [1998] 4 CLJ 209, ' "Prima facie" means on the face of it or at first glance' ... . Prima facie case (is) "A case which is sufficient to call for an answer. While prima facie evidence is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, but is not conclusive". It would follow that there should be credible evidence on each and every essential ingredient of the offence. Credible evidence is evidence which has been filtered and which has gone through the process of evaluation. Any evidence which is not safe to be acted upon should be rejected' at p 691.

[58] Based on what has been discussed above, it was therefore the finding of this court that the prosecution had made out a prima facie case against the accused which if it remains unrebutted would warrant a conviction. This finding is based on an objective assessment of the evidence adduced in this court. The accused was therefore called upon to enter his defence. As indicated earlier, the accused chose to give evidence under oath.

ACCUSED'S DEFENCE

[59] The accused is a 43 year old man and worked in the construction business as a sub-contractor. He is married to PW4 and they have three children. Giving evidence on oath, the accused told the court that on 17 April 2001, driving the vehicle Vitara, he arrived at Hiap Loong workshop around 1pm to get the tyre alignment done. It was during the lunch break and while waiting he received a call from one, 'Lau Yeh', who asked the accused to see him regarding some money matters. Without doing the repair work, the accused drove the vehicle Vitara to Jalan Lintas near the Taman Ria junction to meet 'Lau Yeh'.

[60] He saw 'Lau Yeh' standing beside a small motorbike: blue coloured Suzuki and observed that he was hugging his helmet with both hands against his stomach with the hollow side facing his stomach. As 'Lau Yeh' entered his car on the left hand side of the passenger's seat, he ('Lau Yeh') placed his helmet on the floor of the vehicle with the hollow part of the helmet facing on to the floor of the front passenger's seat.

[61] When 'Lau Yeh' entered the car he was sweating and smoking. Though he was talking normally he looked nervous. He was never like that before and the accused suggested that it may be because 'Lau Yeh' had been waiting too long under the sun or that he was tired. 'Lau Yeh' demanded for payment of money that the accused owed him.

[62] The accused also testified that he had borrowed twice from 'Lau Yeh' who is also a money lender (Ah Long). On the first occasion he borrowed RM50,000 and had settled the same. On the second occasion, he borrowed RM150,000 and had paid RM50,000 and the outstanding sum payable by the accused to 'Lau Yeh' was RM100,000.

[63] The accused testified that 'Lau Yeh' was in his car talking for about 20 minutes and while inside he took the whole tissue box from the dash board and put it on his lap to wipe out his sweat.

[64] When 'Lau Yeh' left the vehicle, the accused proceeded to Inanam to visit his site. While driving in front of Choon Nyen Fatt Supermarket Sdn Bhd, Lorong Inanam Point 2, Inanam his vehicle was stopped by a group of police officers led by PW2, who conducted a search in the accused's vehicle. PW2 found a red plastic bag (exh P7) on the floor of the front passenger's seat. When exh P7 was opened, PW2 found one blue/white box and inside it PW2 found four clear plastics containing the offending drugs.

[65] The accused testified that he had no prior knowledge of P7 or its content except after it being pointed out by the police during the search. He told the court that was the first time he saw it. He further told the police officers that the impugned P7 was not his and that he did not know who it belonged to. The accused alleged that one of the police officers threw the package to the accused and he was asked to keep quiet. The accused spoke to one of them to ask him whether they can move the car and talk later because he did not want his vehicle to block the traffic. The police thereafter pushed the accused's vehicle to the side and checked his vehicle. He was asked to sit at the back of the car as they drove to his house at Foh Sang in Kota Kinabalu. In the car, the accused testified that he informed them that some one had earlier on left his car but this was ignored. After checking his house, the accused was brought to Karamunsing (the police station) and detained.

[66] As to the impugned drug found in the red envelope (exh P11) at the dashboard inside the vehicle, the accused testified he had no knowledge of it and its contents and claimed that it was shown to him for the first time at the Police Station at Karamunsing on 18 April 2001 by a police officer. He testified that the said police officer told him that P11 was found on the dash board of the vehicle, placed under a tissue box.

[67] The second defence witness was ASP Tan Guan Chai ('DW2'), the then Head of the Narcotics Departments, at Ibu Pejabat Daerah at Karamunsing, Kota Kinabalu. DW2 testified that he was the one who took the cautioned statement of the accused in Mandarin (exh D1) on 19 April 2001 at 2.30pm two days after the date of arrest. The accused in exhibit D1 absolutely denied any knowledge of the offending drugs found in the vehicle. He also mentioned to the police officers about 'Lau Yeh' the person whom he last met and who had entered and sat in the front passenger seat of his vehicle just before his arrest on 17 April 2001.

[68] The third and last defence witness was Yap Sing Keong ('DW3'). DW3 is the nephew of the accused in that the accused is the younger brother of his father. DW3 manages a motorcycle shop at Likas. He also testified that before his arrest, the accused did mention to him that he owed money from someone and approached DW3 for help as he needed to pay the debt. As the amount was rather large, DW3 could not afford it and could not assist. The accused had mentioned to DW3 about the 'Ah Long' (money lender) from whom he owed money.

[69] DW3 also testified that when he met the accused three to four times at the prison and the accused requested him to look for 'Lau Yeh'. PW3 tried to but was unsuccessful.

[70] DW3 testified that 'Lau Yeh' was his regular customer for a period of three to four years, and 'Lau Yeh' regularly came to his shop to repair his motorcycle. Despite that, DW3 could not remember the registration plate of 'Lau Yeh's motorcycle.

EVALUATION OF THE EVIDENCE OF DEFENCE WITNESSES

[71] In the examination in chief, the accused, DW1 did testify that he owns two vehicles, one Isuzu Invader and a Suzuki Vitara. Though he spoke about the loss of the keys for the Vitara, the confusion, contradictions he created and caused must have resulted in the learned counsel for the DW1 in rightfully not pursuing this point in his final submission. Likewise, this court can see no reason to deliberate on it save to note the credibility of the accused.

[72] What is perhaps pertinent to record is that though PW3 saw the accused coming to repair the alignment in respect of the Isuzu Invader he did not see the accused returning to the Tyre shop with the Suzuki Vitara ('Vitara').

[73] Any suggestion to say that someone may have put the impugned drug inside the Vitara after the accused allegedly went to Hiap Loong Tyre shop would not hold water as during cross examination the accused said when he entered the Vitara after receiving the phone call from 'Lau Yeh' he did not see any red plastic bag or anything on the passenger's seat. Therefore at the time he went into the Vitara heading for Inanam at Hiap Loong Tyre Shop (that is if the accused did go there) exhs P7 and P8 were not at the respective places as found by the police. It also strengthened the testimony of PW4 that when she first used the Vitara she did not notice any red plastic bag, neither did her daughter see anything. This remains true as when the accused sent PW4 back at about 12 noon, PW4 did not see any plastic bag on the floor of passenger's front seat of the Vitara. By one stroke, this evidence ruled out PW4 may have put the drug inside the Vitara and rules out someone planting the drug when the accused was inside the office of Hiap Loong Tyre shop to read newspapers as he alleged.

THE EXISTENCE OR NON-EXISTENCE OF 'LAU YEH'

[74] In his testimony, the accused said he met 'Lau Yeh' and observed in great detail the manner in which he held his helmet whilst waiting for the accused. The accused also testified to the court that 'Lau Yeh' hugged his helmet with both hands against his stomach with the hollow side facing his stomach. Further, the accused observed the manner the helmet was placed on the floor of the vehicle. But despite being so observant, after 'Lau Yeh' left his vehicle the accused did not see any red plastic bag on the floor of passenger's seat. During cross examination, the accused testified and marked in a photograph produced in the court the location of the exhibit P7 and it is obvious that there was nothing blocking his vision! The fact that the plastic bag was red in colour would make it easily noticeable. Upon being stopped at Inanam by PW2 and his men, the accused said in his cautioned statement (exh D1) from line 32 to 44:

> 'Apabila saya berada di kawasan berdekatan dengan Maybank (sic) Finance, saya telah ditahan oleh beberapa orang yang tidak dikenali. Mereka memperkenalkan diri mereka sebagai polis dan ingin membuat pemeriksaan. Mereka terus buka pintu kereta saya membuat pemeriksaan dan *terus juga menjumpai satu beg plastik warna merah yang berisi satu kotak warna biru/putih yang mengandungi beberapa bungkusan plastik berisi bahan-bahan hablur putih di kiri tempat duduk saya.*' (Emphasis added.)

[75] It is obvious therefore that exh P7 was there all along when the accused was on the way to Inanam because in his evidence as well as his cautioned statement, the accused said after 'Lau Yeh' left his car, he went straight to Inanam. This is another instance when the accused chose not to tell the truth.

[76] Another instance is that during examination in chief the accused testified that 'Lau Yeh' was in his car for 20 minutes and when he was cross examined he said 'Lau Yeh' was with him for 10 minutes.

[77] The accused also failed to testify if he did or did not say: 'ada sikit barang', when he was asked by PW2 upon the discovery of P7 in his vehicle.

[78] The accused also denied knowledge of the existence of exh P11 and said in his evidence in chief that he was first shown P11 on 18 April 2001, one day after his arrest at the Karamunsing Police Station. However in his cautioned statement (D1) at p 4 line 62 he was asked thus:

> 'Ada apa-apa barang yang lain dijumpai selain dari bungkusan barang yang terletak di bawah tempat duduk penumpang itu?'

His reply from line 65 of p 4 to line 3 of p 5 (D1) which says:

> 'Ada suatu bungkusan yang kecil lagi dijumpai di atas 'Dashboard'. Saya bertanya *lagi kepada polis yang membuat pemeriksaan apa itu barang.*' (Emphasis added.)

[79] The reply given here indicates clearly that P11 was found when the police searched the vehicle and not the day following the arrest.

[80] So much about the impugned P7 and P11. What about 'Lau Yeh'? Does he exist or not? It was said that 'Lau Yeh' was a 'loan shark' and the accused still owed him RM100,000. 'Lau Yeh' was also the person the accused was alleged to be with when the accused lost his Vitara key. He was also the person who came into the vehicle of the accused when the accused was on the way to Inanam. He was nervous and sweating and sat on the front passenger's seat and smoking at the same time. It was 'Lau Yeh' who pressed the accused for the payment of money owed. The accused knew him for one year plus but his name was not known to the accused.

[81] Despite the fact that the accused has not paid the amount of RM100,000 the accused gave evidence that his wife and family has never been harassed by 'Lau Yeh' and said that his wife told him that nobody ever came for the debt. The loan given by the 'loan shark' 'Lau Yeh' is interest free. Furthermore there was no loan agreement and no security for the loan.

[82] The accused also claimed that 'Lau Yeh' is in Kuala Lumpur but the police were never notified about this fact. But why was 'Lau Yeh' not produced in court?

[83] As regards the motorcycle plate number of SA 4019 allegedly owned by 'Lau Yeh' as mentioned in his cautioned statement, the accused said he was not sure of the number. When told by the learned deputy public prosecutor that SA 4019 is the registered number of a lorry registered in the name of Lembaga Letrik Sabah, the accused said that he was not sure if the ending alphabet was A, B or C and said that it is the combination of the above mentioned four numbers.

[84] The testimony of DW3 about 'Lau Yeh' was not helpful either. DW3 testified that 'Lau Yeh' was his regular customer for the last three to four years. In fact six months after the accused was arrested 'Lau Yeh' still came to see DW3 to repair his motorcycle. Despite being a regular customer, DW3 never knew the real name of 'Lau Yeh'. Further, DW3 testified that he does not know the motorcycle registration plate number of 'Lau Yeh'!!!

[85] What is obvious from the testimonies of the accused and DW3 is that though they both know 'Lau Yeh', his real name is not known. 'Lau Yeh' is a 'loan shark' yet there is no interest on the loan of RM100,000. More surprising is that there is no loan agreement and neither was there any security offered for the loan. Both witnesses also failed to provide the place where 'Lau Yeh' could be found. The accused said that 'Lau Yeh' is in Kuala Lumpur and DW3 said that 'Lau Yeh' is from Seremban. That being the case, why was 'Lau Yeh' not called by them to give evidence in court if 'Lau Yeh' really existed. Even the simple thing like the registration plate number of 'Lau Yeh's' motorcycle could not be provided by them. The number given by the accused was the registration number of Lembaga Letrik Sabah. In the case of DW3, despite the fact that 'Lau Yeh' is a regular client of his for a period of three to four years, he does not know the plate number either. DW3 is involved in the 'business' of motorcycles as his business is the selling of motorcycles. It is quite incredible, despite the industry or business that he is in and the

fact that he claims 'Lau Yeh' to be his regular client for three to four years, that DW3 cannot remember the registration number of 'Lau Yeh's' motorcycle if 'Lau Yeh' does exist and is not a fictitious character introduced to create a plausible story in order to escape punishment. It is the view of this court therefore that 'Lau Yeh' is only a fictitious character.

[86] On the testimony of DW3, this court has to be cautious as the deputy public prosecutor told this court that DW3 was inside this court following the proceedings during the prosecution stage. He is also an interested party as the accused is his uncle.

[87] This court is not satisfied with the manner in which both the accused and DW3 answered the questions put to them by the learned deputy. Their demeanour and their way of responding to the questions posed by the learned deputy give rise to the doubt that this court has as to their credibility. This court has great reservations as to whether both the accused and DW3 are truthful witnesses.

WAS THE ACCUSED IN POSSESSION OF THE IMPUGNED DRUG?

[88] In the cautioned statement (D1) of the accused that he made on 19April 2001, two days after he was arrested, he said of the police team led by PW2, after his car was stopped at Inanam: 'Mereka terus buka pintu kereta saya membuat pemeriksaan dan *terus menjumpai satu beg plastik warna merah mengandungi beberapa paket bungkusan plastik berisi bahan-bahan hablur putih* di tepi tempat duduk penumpang di sebelah kiri tempat duduk saya'. (Emphasis added.)

[89] At p 4 line 65 and p 5 lines 1 to 3 of D1 the accused said: '*Ada suatu bungkusan yang kecil lagi dijumpai di atas "Dashboard*" '.

[90] This shows that when the vehicle in which the accused was driving was stopped, the impugned drug was in his vehicle. He was alone in control of the car.

[91] The accused wife ('PW4') who had earlier on used the vehicle testified that when she was sent home at 12 noon by the accused using this vehicle, she said she sat on the passenger's left front seat. She did not see any red plastic bag on the floor of the vehicle. The accused left the house in the same car, going as he claimed to the Hiap Loong Tyre Shop at Penampang Towering Centre, Kota Kinabalu. The accused also gave evidence that when he left the tyre shop responding to the call of 'Lau Yeh', he did not see anything on or near the passenger's seat on the front left hand side of the vehicle. From there he allegedly went to see 'Lau Yeh'. After about 20 minutes with 'Lau Yeh' he headed for Inanam where he was stopped by PW2.

[92] This court is well aware that the following ingredients must be proved beyond any reasonable doubt by the prosecution:

(a) The accused was in possession of the drug in that:

(i) he had some form of custody and control;

(ii) he had knowledge of the drug.

(b) The said drug is a dangerous drug under DDA and the weight of such drug should be 50g or more.

[93] On the facts of the case and based on the arguments outlined above, this court agrees with the learned deputy public prosecutor that the accused had physical control of the impugned drugs.

[94] This court has also examined the authorities at encll 31, 33 and other supplementary authorities given by learned counsel for the accused which includes, inter alia *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237 at p 239, *Leow Nghee Lim v Reg* [1956] MLJ 28 at p 29 and *Tong Peng Hong v Public Prosecutor* [1955] MLJ 232. In *Wong Nam Loi v Public Prosecutor* [1997] 3 MLJ 795, Shaik Daud JCA (as he then was) said 'In most cases knowledge cannot be adduced by direct or tangible evidence but only by inference from the surrounding circumstances'. It can readily be recognized that in drug cases it is difficult to get direct evidence. The modus operandi of drug traffickers has become more sophisticated but let us examine the conduct of the accused. The evidence established is that the accused was seen to be driving slowly in a busy street at Inanam. When the accused was stopped at Inanam, he was in a state of shock. He asked PW2: 'Boss, kita pergi ke hadapan, kita boleh cerita' and when the impugned drug was found the accused was asked as to what it was, he was heard to utter the words 'Ada sikit barang'. It is the view of this court that from the above mentioned surrounding circumstances the irresistible inference is that the accused must have had knowledge of the impugned drugs inside the red plastic bag as well as the red paper envelope at the dashboard on the left front side of the vehicle.

[95] Applying the facts of this case, which has been discussed earlier, on the authorities offered, this court can only make one finding. This court finds that the accused has possession of the impugned drug in the vehicle Suzuki Vitara.

CHAIN OF EVIDENCE

[96] It is the considered view of this court there was no break in the chain of evidence from the time the arrest was made on the accused until the alleged methamphetamine reached the chemist and lastly produced in this court.

AMOUNT OF THE DRUG METHAMPHETAMINE FOUND

[97] PW1, the chemist, has testified that following the tests that he conducted based on the existing *Recommended Method for Testing Amphetamine and Methamphetamine* by the United Nations, the impugned drug found in the vehicle was Methamphetamine. No evidence was adduced by the defence to dispute this finding. The defence did not call any other chemist or other

expert to challenge the procedure and method used by PW1 in analyzing Methamphetamine. The net weight of Methamphetamine found in exhs P10A, P10B, P10C and P10D was 148.64g. This figure of 148.64g exceeds the '50g' envisaged under s 37(da)(xvi) of the DDA. On this figure alone, the accused shall be presumed until the contrary is proved, to be trafficking in the said drug. The contrary was never proved.

[98] If the figures of 148.64g were to be added with the contents of P11 which PW1 gave as 3.79g of Methamphetamine, then the grand total of Methamphetamine found is 152.43g, the amount mentioned in the charge.

[99] After careful examination and evaluation of the evidence in its entirety, and after perusal of all the authorities filed into this court, there is overwhelming evidence to show that the prosecution has proved its case beyond any reasonable doubt and that the defence failed to raise any reasonable doubt on the prosecution case.

[100] This court therefore finds that the accused is guilty of the offence charged and hereby convicts him. The sentence under s 39B(2) of the DDA is mandatory. This court therefore sentences him to death. Pursuant to s 277 of the Criminal Procedure Code, this court directs that he be hanged by the neck till he is dead.

[101] It is further ordered that the exhibits which are in police custody shall remain there for safe keeping until after the final disposal of appeal to the highest appellate body and may only be dealt with in accordance with the law after the final decision of the highest appellate body has been made.

Accused found guilty, convicted of trafficking and death sentence imposed..

Reported by Kiri Cowie